

employment relationship with respondent, under K.S.A. 44-506 there is no jurisdiction for this claim.

Second, respondent alleges claimant failed to give timely notice as required by K.S.A. 44-520 of an injury occurring in Hiawatha, Kansas, on September 4, 2004. While respondent admits claimant provided notice of an injury occurring in Chicago, Illinois on August 30, 2004, it contends claimant never notified any of its representatives of a subsequent injury occurring on September 4, 2004.

Third, respondent alleges claimant's evidence fails to establish that he sustained an accidental injury arising out of and in the course of employment. Respondent asserts that claimant's September 4, 2004 fall occurred when claimant made a social stop at the conclusion of his driving day in Hiawatha, Kansas. Claimant sustained a shoulder injury while getting into his truck to retrieve a pack of cigarettes, and because he was not working for respondent at the time of his accident, his injury is not compensable.

Claimant urges the Board to affirm the ALJ's preliminary hearing Order. Claimant maintains that he met his burden of proof and is entitled to the medical treatment authorized and awarded by the ALJ.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as an over-the-road truck driver. Respondent's home base is in Virginia and claimant began his last load for respondent from New Jersey. When he delivered the goods to a customer in Chicago, Illinois, on August 30, 2004, claimant testified that he hurt his right shoulder. He did not contact his employer at that time and continued on his route.

Then, on September 4, 2004, claimant arrived in Hiawatha, Kansas. As he was at the end of his driving day, he elected to spend the night with a friend, Doris Shopteese. According to claimant, he was getting out of his truck at Ms. Shopteese's home, when he slipped and fell to the ground. He claims he hit his head and neck and landed on his right shoulder. He did not contact his employer at that time. The same day, claimant went to the emergency room in Topeka, Kansas and sought treatment for shoulder complaints. The medical record from this visit reflects a diagnosis of shoulder pain and does not include any history of injury. Claimant was referred to a local orthopaedic physician for follow-up.

After visiting the emergency room, he waited a few days then contacted Chris Widener, his dispatcher, in Virginia on September 7, 2004. According to claimant, he told Mr. Widener of his injury and was referred to Stan Farhy. Claimant then called Mr. Farhy

and told him of his injury. Claimant cannot recall precisely what he told Mr. Farhy. He generally recalls telling him of the events that occurred in Chicago, Illinois, explaining the right shoulder injury, but he doesn't recall whether he told Mr. Farhy about the fall from his truck in Hiawatha, Kansas.² He only remembers telling Mr. Farhy that he was injured.

Both Chris Widener and Stan Farhy testified by deposition. Mr. Widener testified that claimant called in on September 7, 2004, and informed him that he had been hurt on August 30, 2004 while in Chicago. Mr. Widener asked claimant why he was just now informing him of this incident, and claimant told him that it wasn't giving him problems. At no time during this conversation did claimant disclose an accidental injury in Hiawatha, Kansas.

Mr. Farhy testified that claimant called him on September 7, 2004. He indicated that claimant told him that while he was picking up a load in Chicago on August 30th and preparing to leave he had to climb up and pull a roll bar down, and as he was doing that he slipped and pulled his arm out of joint.³ Claimant informed Mr. Farhy he had already been seen by a doctor. According to Mr. Farhy, claimant did not mention any accident in Hiawatha, Kansas on September 4, 2004.

Currently claimant's shoulder is hurting enough to the point where he cannot drive his truck. He stated that "[i]t hurts if I – if I move it very far away from my body or if it gets moved from my body"⁴. He stated he has a constant ache in his shoulder and in his neck and down his arm. Claimant has not worked for respondent since September 4, 2004.

On September 8, 2004, claimant was seen by Dr. Kenneth Teter. Dr. Teter's record indicates claimant's shoulder injury occurred when claimant "fell out of the back of a trailer on 8-27-04" when claimant "caught himself with his right arm extended."⁵ There is no mention in this record of any accident or fall on September 4, 2004.

Around September 10th, Doris Shopteese contacted Mr. Farhy and told him that claimant's accident did not happen as he says. She indicated that claimant was trying to file a false workers compensation claim and asked her to lie about where he was injured. This sparked Mr. Farhy to turn this information over to the insurance company for an investigation.

In Ms. Shopteese's deposition she relayed her version of how claimant was injured:

² P.H. Trans. at 24-25.

³ Farhy Depo. at 5.

⁴ P.H. Trans. at 19.

⁵ *Id.*, Resp. Ex. A.

A. He [claimant] pulled in the drive, got out of the truck, came into the house to check to see what I was cooking, commented that the pork chops looked very well, and he said that they looked very professional. And I asked him, Did you get my cigarettes? And he said, Oh, yes, I did, let me go out and go get them. So he went back out to get them. And I turned the fire down.

As I was walking back to the living room – or the dining room, I peeked out the window, and I seen Jim [claimant] on the steps of the truck with a sack in his hand which had the cigarettes in them, and he was shaking back and forth saying, Whoa, baby, I'm happy to be home.

Q. Okay. What happened after that?

A. He fell off the top of the step.

Q. He fell off of his truck?

A. Yeah. He was on the top step with the door shut.

Q. And this was after he had already arrived, been in the house and had gone back to the truck; is that correct?

A. Yes.

Q. Okay. Did he mention anything about hurting himself when he fell from the truck?

A. I ran out and checked on him, and he was covered with rocks and pebbles, because my driveway is rocks, and I brushed them off from him, and I asked him if he was okay. And he said that his shoulder was kind of hurting but that it would be okay.⁶

Ms. Shopteese stated that she went out, and helped claimant up, and suggested that he see a doctor, but claimant would not go. She indicated that claimant told her if his job ever called her she was to remember that he was hurt in Chicago.⁷ Ms. Shopteese states her reason for calling Mr. Farhy was because claimant had been taking Demerol and then going out and driving his truck, and she was concerned that claimant should not be driving and wanted to check with his supervisor. It is clear from the record that claimant and Ms. Shopteese have had a parting of the ways and her motives may be less than altruistic. In fact, the claimant's landlord, Pama Bruce, testified that Ms. Shopteese has been the source of ongoing disturbances at the hotel where he has been residing.

⁶ Shopteese Depo. at 5-7.

⁷ *Id.* at 8.

Claimant was last seen by Dr. Kimball Stacey on December 23, 2004, at his lawyer's request. Dr. Stacey's report indicates claimant was injured on October 7, 2004⁸ when he fell from the cab of his tractor trailer onto the ground. Claimant denied "any prior symptoms, injuries or accidents similar to those described" in his report.⁹ Dr. Stacey's report indicates that immediately after the accident, claimant initially complained of severe pain in his neck and right shoulder, confusion and stiffness in his upper back. Dr. Stacey opined that claimant's injuries were due to his work-related accident. He recommended claimant have an MRI done for his right shoulder and that he see an orthopedic physician.

When medical benefits were not forthcoming, a preliminary hearing was held. The ALJ considered this evidence and noted the inconsistency in claimant's recitation of the events. He noted that "[w]hile the testimony of Ms. Bruce casts doubt upon the testimony of Ms. Shopteese, the Court finds the [c]laimant's own words are so conflicting as to cast doubt upon his credibility."¹⁰ Even so, the ALJ went on to award the claimant medical benefits.

The Board has considered the evidence and finds the ALJ's preliminary hearing Order should be reversed. Both claimant and respondent agree that claimant sustained an injury while in the course and scope of his employment on August 30, 2004, while in Chicago, Illinois. Respondent further admits timely notice of this accident, but in order to have jurisdiction over that accident, certain criteria must be established. The Kansas Workers Compensation Act confers jurisdiction when one of two elements can be satisfied: (1) if the principal place of employment is within the state, or (2) the contract of employment was made within the state, unless the parties' contract specifically provides otherwise.¹¹

K.S.A. 44-506 provides:

The workmen's compensation act shall not be construed to apply to business or employment which, according to law, is so engaged in interstate commerce as to be not subject to the legislative power of the state, nor to persons injured while they are so engaged: *Provided*, That the workmen's compensation act shall apply also to injuries sustained outside the state where: (1) The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless such contract otherwise specifically provides: *Provided, however*, That the workmen's compensation act shall apply to all lands and premises owned or held

⁸ This appears to be an error. Claimant does not know why October is referenced as he maintains he told Dr. Stacey of the September 4, 2004 accident.

⁹ P.H. Trans., Cl. Ex. 1, at 2.

¹⁰ ALJ Order (Jan. 21, 2005).

¹¹ *Abbey v. Cleveland Inspection Services, Inc.*, 30 Kan. App. 2d 114, 41 P.3d 297 (2002).

by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of the state of Kansas and to all projects, buildings, constructions, improvements and property belonging to the United States of America within said exterior boundaries as authorized by 40 U.S.C. 290, enacted June 25, 1936.

Because claimant's August 30, 2004 accident occurred in Illinois, he must establish that his principal place of business is in Kansas, or that his contract of employment was made within this state. Neither of these elements has been established or argued. Thus, there is no jurisdiction over the August 30, 2004 accident. To the extent the ALJ's preliminary hearing Order could be construed to grant benefits for that injury, that finding is reversed and set aside.

Not surprisingly, claimant argues that the August 30, 2004 accident was inconsequential, and that it was the subsequent injury of September 4, 2004 that caused his significant right shoulder complaints as well as the plethora of other bodily complaints he now asserts. Claimant alleges it was the September 4, 2004 accident that arose out of and in the course of his employment that has given rise to his present need for treatment. The difficulty with this argument is that claimant repeatedly failed to mention the existence of the September 4, 2004 accident when seeking medical treatment and when informing his superiors of his injury. Moreover, the record indicates claimant did not give notice of a September 4, 2004 accident.

When claimant first sought treatment from the ER, he disclosed only a shoulder injury and there is no documentation about his history of injury contained within the record. When he called his superiors at the company, they indicate he only advised them of the injury occurring in Chicago, Illinois, and made no mention of the accident on September 4, 2004 in Hiawatha, Kansas. In fact, claimant has no clear recollection of what he told these gentlemen, although he admits generally disclosing the event in Chicago, Illinois. When he presented for further treatment with Dr. Teter on September 8, 2004, he referenced an accident on August 27, not August 30 or September 4, 2004. When claimant saw Dr. Stacey he apparently disclosed an accident date, but Dr. Stacey's report reveals October 7, 2004 as the accident date, and reports that claimant *denied* any other prior symptoms, injuries or accidents similar to those he was presently complaining of.

K.S.A. 44-520 provides:

Notice of injury. Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant

shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The obvious purpose of this requirement is to allow the employer an opportunity to investigate the claim.

Here, both parties agree claimant advised respondent of an August 30, 2004 accident in Chicago. Both of respondent's representatives deny any notice about a September 4, 2004 accident, and claimant has no clear recollection about what he told his supervisors about that alleged accident. Until the time they were contacted by Ms. Shopteese, respondent believed claimant's physical problems were attributable to the August 30, 2004 accident in Chicago. It had no reason to suspect anything was amiss. Based upon this testimony, the Board finds that claimant failed to provide the statutorily required notice for the September 4, 2004 accident. Accordingly, the Board must reverse the ALJ's preliminary hearing Order.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bryce D. Benedict dated January 31, 2005 is reversed.

IT IS SO ORDERED.

Dated this _____ day of April, 2005.

BOARD MEMBER

c: Bruce A. Brumley, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director